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Arnold Schwarzenegger
Governor

TO: Members of the California Water Quality Monitoring Council

FROM: Jon B. Marshack
SB 1070 Coordinator 

DATE: July 6, 2009

SUBJECT: WATER QUALITY MONITORING COUNCIL PURSUANT TO SENATE BILL (SB) 1070 (KEHOE, 2006): LEGAL QUESTIONS AND ANSWERS

At the May 22, 2009 Monitoring Council Meeting, Council Members asked that three legal questions be answered. Ted Cobb, Assistant Chief Council of the State Water Board, and Nathan Jacobsen, Staff Council, provided the following information in response.

Is the Monitoring Council covered by the State's open meeting laws? If so, are there specific requirements of which Monitoring Council Members should be made aware?

As a "state body," Monitoring Council meetings are subject to the Bagley-Keene Open Meeting Act (Government Code §11120 *et seq*) and must be both noticed and open to the public. The definition of a "state body" includes "an advisory committee..., if created by formal action of the state body or any member of the state body, and if the advisory body so created consists of three or more members." This is true even if the decision about who serves on the advisory body is delegated to a staff member. The fact that the Monitoring Council was created by statute removes any ambiguity.

Each state body has essentially three duties under the Open Meeting Act:

- 1) Give adequate notice of meetings to be held (minimum of 10 days in advance of regular meetings);
- 2) Provide an opportunity for public comment; and
- 3) Conduct such meetings in open session, except where a closed session is specifically authorized.

"Meeting" is defined in the Act as including "any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains." (§11122.5(a))

The law now prohibits use by a majority of the members of a state body of direct communications, personal intermediaries, or technological devices (such as e-mails) to develop a collective concurrence among the members. (§11122.5(b)) Members of a state body must refrain from calling or otherwise contacting other members on a one-to-one basis, or conducting serial meetings, in order to arrive at a collective decision outside the meeting on a matter pending before the state body. As a general rule, all voting on items of business to be transacted must be done at a public meeting. Voting by proxy is not authorized.

Meeting notices must also be posted on the Internet at least 10 calendar days before the meeting. The notice of each meeting must include an agenda that is prepared for the meeting. The agenda must include all items of business to be transacted or discussed at the meeting. The notice must also include information that would enable a person with a disability to know how, to whom, and by when a request may be made for any disability-related modification or accommodation, including auxiliary aids or services.

Items not included on the agenda may not be discussed at the meeting, even if no action is be taken by the state body. Items such as "Public Comment on Matters Not on the Agenda" and "Agenda Items for Future Meetings" may appear on meeting agendas. However, matters raised under these agenda items should be discussed only to the extent necessary to determine whether they should be made an agenda item at a future meeting.

With respect to committee meetings of the state body, members of the state body who are not members of the committee that is meeting may only attend the committee meeting as observers. This means these members may not sit on the dais with the committee, make any statements, or ask any questions during the committee meeting.

Additional information on these legal requirements may be found on the internet at: http://ag.ca.gov/publications/bagleykeene2004_ada.pdf and http://www.dca.ca.gov/publications/bagleykeene_meetingact.pdf. Both of these documents include a copy of the Bagley-Keene Open Meeting Act.

Summary of Responsibilities

SB 1070 Staff:

- *Notice requirements*
- *Agenda preparation, dissemination, and web posting*

Monitoring Council Members:

- *Conduct Monitoring Council business and make decisions only in noticed meetings*
- *Adhere to posted agenda and refrain from discussing items not on the agenda*
- *Refrain from conducting serial meetings*
- *Provide opportunity for public input prior to making decisions*

Does the Monitoring Council have liability for data interpretations presented via its web portals?

The State Board could, in theory, be sued for things that are posted, but the individual members of the advisory committee would only be personally liable if they acted in bad faith. Assuming someone filed suit for defamation or something like that, the Attorney General would represent the individuals but would make it clear that such representation is predicated on the person have acted in good faith. If evidence arises that the person deliberately planted false data to harm someone or anything of that sort, the person is on his or her own. Monitoring Council members who have more specific questions in this regard are urged to contact Ted Cobb at (916) 341-5171 or by email at TCobb@waterboards.ca.gov.

Are Monitoring Council Members subject to conflict of interest financial disclosures?

According to Water Board Staff Counsel Nathan Jacobsen, there isn't definitive guidance on whether advisory councils and committees are subject to conflict of interest disclosures. The analysis is very fact specific and done on a case by case basis. The Political Reform Act

specifies that those designated employees who must file financial disclosures does not include unsalaried members of any board or commission that serve a solely advisory function. Only when board or commission members possess decision-making authority are they subject to financial disclosure requirements. Political Reform Act regulations specify that a committee or council possesses decision-making authority whenever:

- 1) It may make a final governmental decision;
- 2) It may compel a governmental decision; or
- 3) It makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant modification or amendment by another public official or governmental agency.

The Fair Political Practices Commission (FPPC) has issued a number of opinions that have interpreted this regulation with respect to various commissions and advisory bodies. Although each case is very fact-specific, in general, the FPPC appears to take a fairly conservative view with respect to advisory boards. Unless the committee has clear decision-making authority (e.g., in the establishing legislation) or can initiate or veto a government decision, the FPPC has found that neither (1) or (2) above applies. This is likely to be the case with the Monitoring Council established pursuant to SB 1070. Nothing in the legislation or the MOU between Cal/EPA and the Resources Agency gives the Council the authority to make final decisions, nor does it have the power to initiate or veto decisions.

Whether the Monitoring Council is subject to reporting requirements largely hinges on (3), above. In its analysis, the FPPC looks at whether a board or commission's decisions are regularly "rubber stamped" by official decision-makers or agencies. In cases where an advisory board has an established history of making recommendations that are regularly adopted without significant modification, the FPPC has found the board to have decision-making authorities. For the Monitoring Council, this does not appear to be the case. The Council makes recommendations and those recommendations are then passed on to the decision-makers. The Council may be advocating for a particular course of action, but it does not appear that it has any power to compel or make a decision itself. Further, the history of the Council thus far does not suggest a pattern of official decision-makers "rubber-stamping" the Council's advice.

As time goes by, if the facts change (i.e. the Council's recommendations begin to be adopted regularly and without modification), this issue should be revisited and a request for formal advice from the FPPC may be necessary.

Attachment

cc: Valerie Connor, Director
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Members of the SB 1070 Work Group